

Several causes contribute to the inadequate price reasonableness determinations. First, contracting officers use questionable competition as a basis for accepting contractor prices.¹⁶⁴⁵ Second, contracting officers relied on unverified prices from contractors.¹⁶⁴⁶ Third, the lack of procurement planning leads to an excessive number of urgent requirements.¹⁶⁴⁷ Finally, staffing problems,¹⁶⁴⁸ lack of senior leadership oversight,¹⁶⁴⁹ and a lack of emphasis on obtaining cost or pricing data contributed to the problem.¹⁶⁵⁰

The DOD procurement community disputed the IG's interpretation of the data sampled. Ms. Lee, the Director of Defense Procurement, denied that the DOD had "systemic problems" determining price reasonableness.¹⁶⁵¹ She stated that the IG failed to consider acquisition reforms that were implemented since the IG's review, and the discretion exercised by contracting officers in determining price reasonableness.¹⁶⁵² Further, according to Ms. Lee, the IG's methodology did not result in statistically valid sampling, producing results that could not be extrapolated across DOD contracting actions.¹⁶⁵³

The Army's view was less argumentative, asserting that less overpricing occurred than the IG reported,¹⁶⁵⁴ but that the overpricing that did occur was a result of an overburdened workforce that has been reduced by more than fifty percent over the past ten years.¹⁶⁵⁵ The Navy also cited manpower problems as contributing to the difficulty in obtaining the required data.¹⁶⁵⁶ The Air Force argued that the sample was not sufficient to make

generalized comments about the status of pricing problems DOD-wide.¹⁶⁵⁷

FISCAL LAW

Release of GAO's "Red Book" Volume IV

One of the most important fiscal law developments of the past year was the long-awaited release of Volume IV of GAO's "*Red Book*."¹⁶⁵⁸ With this release, this "bible" for fiscal law acolytes is nearly complete.

Purpose

Comptroller General Refines Definition of Training

Before this past year's decision in *Payment of Fees for Actuarial Accreditation Examination Review*,¹⁶⁵⁹ there had been several Comptroller General decisions that limited the ability of an agency to use appropriated funds to pay for review courses for accreditation exams. These prior decisions viewed the review courses as personal expenses since the expenses were necessary to qualify the individual for the particular government employment. Thus, in these prior decisions the dividing line between whether training expenses were payable hinged on whether those expenses qualified the individual for a certain position.¹⁶⁶⁰

1644. *Id.* at 1. The IG has issued eleven reports regarding price reasonableness determinations and commercial item classification since FY 1998. *Id.* The most recent prior report is: U.S. DEP'T OF DEFENSE INSPECTOR GENERAL AUDIT REPORT, WAIVERS OF REQUIREMENTS FOR CONTRACTOR TO PROVIDE COST OR PRICING DATA, REPORT No. D-2001-061 (Feb. 28, 2001).

1645. PRICE REASONABLENESS, *supra* note 1642, at 13.

1646. *Id.* at 9-14.

1647. *Id.* at 14.

1648. *Id.* at 15, 18.

1649. *Id.* at 18.

1650. *Id.* at 15.

1651. *Id.* at 112.

1652. *Id.*

1653. *Id.* at 113.

1654. *Id.* at 129.

1655. *Id.* at 130.

1656. *Id.* at 159.

1657. *Id.* at 168.

1658. GENERAL ACCOUNTING OFFICE, PRINCIPLES OF FEDERAL APPROPRIATIONS LAW, SECOND EDITION, VOLUME IV, PUBLICATION No. GAO-01-179SP (Mar. 2001). The preface to volume IV indicates that it will be followed by a volume V.

1659. Comp. Gen. B-286026, June 12, 2001, available at <http://www.gao.gov/decisions/appro/286026.pdf>.

In *Accreditation Examination Review*, the Pension Benefit Guaranty Corp. (PBGC) asked whether it could “use appropriated funds to pay, as training costs, fees for actuary accreditation examination review courses, on-the-job study time, and examination fees.”¹⁶⁶¹ The Comptroller General expressly overruled its prior decisions and indicated that the agency could use appropriated funds for the first two of these three types of expenses. It specifically noted that its prior focus on whether the employee benefited by qualifying for a new position was inappropriate. Instead, the focus should be on whether the proposed training would “improve individual and organizational performance and assist in achieving the agency’s mission and performance goals.”¹⁶⁶² Because taking part in the accreditation review course and study of the materials tested on the exam would improve the employee’s knowledge, skills, and/or abilities (KSAs) that are important to his performance of official duties, PBGC could pay for the course and allow the employee to study on-the-job. The expense of actually taking the accreditation exam, however, was determined to be a personal expense because it would not enhance an examinee’s KSAs; it would merely test her existing KSAs.¹⁶⁶³

Grant Funds Retain Federal Character

The federal government gives a great deal of grant money each year to state, local, and Indian tribal governments.¹⁶⁶⁴ This past year, a district court held that these funds retain their federal character even post-transfer from the federal government.¹⁶⁶⁵ Consequently, a state’s subsequent transfer of a

portion of these funds for an unauthorized purpose violated the “Purpose Statute,” permitting the federal government to disallow these costs and obtain a refund.¹⁶⁶⁶

Before 1980, the Department of Health and Human Services (HHS) and the Alabama negotiated a cost allocation plan (CAP) which identified those state support services for which the federal government would be granting federal funds to Alabama.¹⁶⁶⁷ One of these identified support services for which Alabama received federal funding was a self-insurance fund (SIF). The SIF insured state and local government buildings against arson, vandalism, burglary, and other man-made or natural disasters.¹⁶⁶⁸ Between 1980 and 1986, Alabama transferred \$43.26 million from the SIF to several state health agencies and the state general fund, with a requirement that the SIF be reimbursed when there were sufficient funds in the state general fund.¹⁶⁶⁹

In 1990, the HHS conducted an audit of the SIF. Upon discovering these transfers, the HHS determined in accordance with *OMB Circular A-87* that the transfers “were not allowable uses of Federal funds” and demanded the return of the federal share.¹⁶⁷⁰ The state appealed this determination, arguing that as soon as the granted funds entered the SIF, they ceased to retain federal character and *OMB Circular A-87* was no longer applicable.¹⁶⁷¹ The court accepted the HHS’s contention that Alabama had an on-going requirement to account for federal funds and ensure those funds transferred to the SIF were not transferred to another state-function not approved by the CAP.¹⁶⁷² Consequently, the amount transferred from the SIF had to be returned to the HHS.¹⁶⁷³

^{1660.} *Id.*

^{1661.} *Id.*

^{1662.} *Id.* (citing 5 U.S.C. § 4101(4) (2000)).

^{1663.} *Id.*

^{1664.} In FY 2002, it is estimated the federal government will grant state and local governments over \$350 billion, representing about 17.9% of all federal outlays. See Office of Management and Budget, Historical Tables, Budget of the United States Government, Fiscal Year 2002, 217 tbl. 12.1 (2001) (Table 12.1—Summary Comparison of Total Outlays for Grants to State and Local Governments: 1940-2006).

^{1665.} *Alabama v. Shalala*, 124 F. Supp. 2d 1250, 1257-60 (M.D. Ala. 2000).

^{1666.} *Id.* at 1269.

^{1667.} *Id.* at 1253. Subsection J of *OMB Circular A-87* requires the use of a CAP. FEDERAL OFFICE OF MANAGEMENT AND BUDGET, CIRCULAR NO. A-87, COST PRINCIPLES FOR STATE AND LOCAL GOVERNMENTS (Jan. 28, 1981).

^{1668.} *Shalala*, 124 F. Supp. 2d at 1253.

^{1669.} *Id.* at 1254. The actual transfers were \$18 million to the state general fund, \$12 million to the Alabama Department of Mental Health and Mental Retardation, \$11 million to the Alabama Medicaid Agency, and \$2 million to the Alabama Department of Public Health. None of the transferees’ support services were embodied in the CAP. *Id.*

^{1670.} *Id.* at 1254-55. The HHS also demanded lost interest on the transfers, but an HHS appeals board determined that the HHS had no authority to recover such interest. *Id.* at 1255.

^{1671.} *Id.* at 1257.

^{1672.} *Id.* at 1258-59.

DOD Admonished for Creative Bookkeeping Practices

In 1990, Congress thought that it addressed the inadequate controls over appropriation accounts, especially those within the DOD.¹⁶⁷⁴ As a July 2001 GAO report revealed, the DOD, more than any other federal agency, has difficulty abiding by these rules. Specifically, the GAO report revealed that the DOD made \$615 million of improper or illegal adjustments to closed appropriations accounts during FY 2000.¹⁶⁷⁵

The total amount of \$615 million was the result of four major categories. The first, disbursements worth \$107.7 million, had been charged to closed accounts.¹⁶⁷⁶ The largest chunk of this figure comes from disbursements made by the Defense Finance and Accounting Service-Columbus (DFAS-Col).¹⁶⁷⁷ In December 1999, DFAS-Col changed \$79 million of disbursements from charges against FYs 1993-1995 R&D appropriations to charges against an FY 1992 R&D appropriation. The adjustments were made to redistribute payment in accordance with the contract, that is, using oldest funds first.¹⁶⁷⁸

The second category is disbursements made before enactment of the appropriation. The total under this category is \$38.2 million, and includes \$21 million of disbursements that were charged to FY 1989 and FY 1990 and then changed to charges against FY 1998 and FY 1999 accounts.¹⁶⁷⁹ In addition, \$9.9 million of this amount was overpayments redistributed to

expired and closed accounts, instead of returning it to the Department of the Treasury.¹⁶⁸⁰

The third, and largest category cited in the GAO report included \$364 million worth of unnecessary adjustments. The DOD made these adjustments during contract reconciliations to try to correct errors in recording disbursements made under the contracts.¹⁶⁸¹ In one case, DFAS-Col made \$210 million in adjustments to closed accounts that resulted in accounting errors in those accounts that did not exist before the reconciliation.¹⁶⁸²

The last category included insufficient documentation to support \$104.9 million worth of adjustments. In one instance, DFAS-Col changed over \$2.4 million of disbursements against an FY 1993 appropriation that had not yet been closed to an FY 1992 appropriation that had been closed.¹⁶⁸³ Unfortunately, no supporting documentation exists to prove the adjustment was needed to correct an earlier disbursing error.¹⁶⁸⁴

The GAO made clear its displeasure with the DOD's seemingly aloof attitude, concluding:

The DOD was aware of the limitations the account closing law placed on the availability of cancelled appropriations and that the law was enacted because of previous abuses by DOD's use of old appropriations. The department also knew that a major system

1673. *Id.* at 1254-55. The court did not discuss whether those funds would be subject to the Miscellaneous Receipts Statute, 31 U.S.C. § 3302(b) (2000).

1674. National Defense Authorization Act for Fiscal Year 1991, Pub. L. No. 101-510, § 1405 (1990), 104 Stat. 1678 (codified as amended at 31 U.S.C. §§ 1551-1558) (2000). The law provided that appropriation accounts would be closed five years after the period of availability of a fixed-term appropriation. After closing, funds from the account could not be used for obligations or expenditures for any purpose. *Id.*

1675. See GENERAL ACCOUNTING OFFICE, CANCELED DOD APPROPRIATIONS: \$615 MILLION OF ILLEGAL OR OTHERWISE IMPROPER ADJUSTMENTS, REPORT NO. GAO-01-697 (July 26, 2001) [hereinafter GAO REPORT NO. 01-697].

1676. *Id.* at 9-10 and tbl. 1.

1677. *Id.* at 7. The focus of the report is on the disbursement practices of DFAS-Col, because according to DFAS headquarters officials, DFAS-Col makes about ninety-nine percent of DOD's annual closed appropriation account adjustments. *Id.*

1678. Unfortunately, according to the GAO, this adjustment was improper because it had occurred four months after the FY 1992 R&D account had closed on 30 September 1998. *Id.* at 3.

1679. *Id.* at 11-12. Although the report does not specifically offer any reasons for these particular improper adjustments, they seem to be the result of deficiencies in the DOD's Contract Reconciliation System (CRS). *Id.* at 3. These adjustments were improper because they charged disbursements to appropriation accounts "that had not yet been enacted at the time the disbursements were actually made." *Id.* at 11. See also 31 U.S.C. § 1502(a) (2000) (stating that an appropriation "is available only for payment of expenses properly incurred during the period of availability").

1680. See GAO REPORT NO. 01-697, *supra* note 1675, at 12. Collections normally creditable to an appropriation account received after the account is closed, "shall be deposited in the Treasury as miscellaneous receipts." See 31 U.S.C. § 1552(b).

1681. See GAO REPORT NO. 01-697, *supra* note 1675, at 12.

1682. *Id.* The GAO observed that the actual disbursements on these closed accounts, some of which were made ten years earlier, were recorded correctly at the time they were made. *Id.*

1683. *Id.* at 13.

1684. See *id.*

used to control its use of appropriations allowed for disbursements to be charged in a way that was inconsistent with the law. However, it did nothing to fix the system, although it estimated the cost to do so would be minimal.¹⁶⁸⁵

The GAO recommended both short-term and long-term solutions. The short-term recommendations include “immediately reversing the erroneous adjustments” and “determining the correct accounting for the reversed adjustments.”¹⁶⁸⁶ The long-term solutions include “ensur[ing] that the requisite controls are properly included and operating effectively in [the DOD’s Contract Reconciliation System]” to prevent disbursements to closed or unopened accounts; “revise current policies and procedures pertaining to closed account adjustments to include specific detailed guidance” to ensure future adjustments to closed accounts are proper; and “establish a monitoring program for future adjustments to closed appropriation accounts and make clear to managers that they will be held accountable if abuses are identified.”¹⁶⁸⁷

Time will tell how the DOD reacts to the GAO’s recommendations. Although there may be some that claim the problem was inherited,¹⁶⁸⁸ the problem is similar to many that the DOD faces in these turbulent times. It must resolve a long-running problem that needs immediate attention and quickly implement effective, long-term, preventive measures.

Sorry, Phases Two and Three Are Off the Clock

When dealing with agreements that allow funds to be expended in subsequent fiscal years, agencies should have clear

plans on how these funds will be spent or risk losing them. That’s just what the U.S. Total Army Personnel Command (PERSCOM) discovered when it requested a decision regarding funds that it had provided to the GSA’s Federal Systems Integration and Management Center (FEDSIM).¹⁶⁸⁹

PERSCOM was tasked with the implementation of an EO¹⁶⁹⁰ that prescribed a uniform system for classifying, safeguarding, and declassifying national security information. It entered into an agreement with FEDSIM under which FEDSIM would contract for the development and implementation of a declassification management system on behalf of PERSCOM.¹⁶⁹¹ The agreement articulated a three-phase project, but provided details only for phase one. The agreement mentioned that the plan “might be expanded to include Phases II and III,” but “did not provide specific work requirements, time frames, or cost estimates for additional phases.”¹⁶⁹²

PERSOM obligated \$17.5 million of FY 1997 funds under the agreement with FEDSIM. By May 1998, only phase one was completed, at a cost of \$8.5 million. The GAO advised PERSCOM that it could not use the remainder of the funds (\$9 million) because it had not incurred any obligations on phase two or phase three. In this instance, banking all of the funds in FEDSIM without an articulated plan for subsequent phases resulted in the expiration of \$9 million. To continue the project, additional funds must be obligated from current FY funds.¹⁶⁹³ Agencies that acquire information technology through the GSA must clearly articulate a bona fide need for future projects in the fiscal year that funds are obligated.¹⁶⁹⁴

1685. *Id.* at 19.

1686. *Id.*

1687. *Id.* at 19-20.

1688. *See generally DOD Illegally Paid Bills from Closed Appropriations Accounts, GAO Says*, BNA FED. CONT. REP. (July 31 2001) (noting that DFAS Director Thomas Bloom and Deputy Under Secretary of Defense for Financial Management Tina Jones “agreed with the [GAO] recommendations, but said the administration inherited the financial management problems”). *See also* Tanya N. Ballard, *Audit Uncovers \$615 million in Illegal Defense Payments*, GOV’T EXECUTIVE MAG., July 27, 2001 (citing Congressman Steve Horn’s (R-CA) remark that “[t]his is not a new issue. . . . Long ago, Congress suspected that [the DOD] was abusing old appropriations.”).

1689. Continued Availability of Expired Appropriation for Additional Project Phases; Comp. Gen. B-286929, Apr. 25, 2001, available at http://www.access.gpo.gov/su_docs/aces170.shtml. For further discussion of this decision, see *infra* notes 1775-89 and accompanying text.

1690. Exec. Order No. 12,598, 60 Fed. Reg. 19,825 (Apr. 17, 1995).

1691. *Continued Availability*, Comp. Gen. B-286929, at 1-2. FEDSIM derives its financing through a revolving fund (Information Technology Fund). The advantage of using FEDSIM for IT services and supplies is that the Brooks Act, not the Economy Act, governs FEDSIMS agreements. The practical effect is that funds obligated under a FEDSIM agreement can be used in subsequent fiscal years, as long as the funds were properly obligated prior to expiration, the requirement still exists, and the inter-agency agreement has not expired. Under inter-agency agreements governed by the Economy Act, a fixed-year appropriation must be deobligated at the end of the fiscal year charged to the extent that the performing agency has not performed or incurred valid obligations. *See* 31 U.S.C. § 1535(d) (2000).

1692. *Continued Availability*, Comp. Gen. B-286929, at 3.

1693. *Id.* at 4. As the last sentence of the opinion suggests, however, money can be obligated for both phases two and three using current fiscal year funds, so long as they are for valid obligations. *See id.* at 5.

The Antideficiency Act

Not Unless Authorized by Law . . .

In a letter to the Chairman, Subcommittee on Defense, House Appropriations Committee,¹⁶⁹⁵ the GAO provided a good review of the basic rules on obligating appropriated funds as well as the application of the “unless otherwise authorized by law” exception to the Antideficiency Act.¹⁶⁹⁶ Basically, this decision answers the question: What does an agency do when it is required by law to make a payment, but does not have sufficient funds available to cover that payment? Reviewing the operation of the DOD’s TRICARE Program, the GAO determined that eligible beneficiaries are entitled to treatment under authorizing statutes.¹⁶⁹⁷ Therefore, when an eligible beneficiary receives treatment, the DOD must pay for such treatment.¹⁶⁹⁸ Based on this analysis, the GAO concluded that expenditures to pay for such treatment are lawful, even if those expenditures exceed the amounts available in the applicable appropriation.¹⁶⁹⁹ Practitioners faced with issues regarding funding of mandatory requirements will find this decision a useful primer.

Construction Funding¹⁷⁰⁰

“Youse Want a Piece of My Tower?” Pay for It!

The FAA is constructing a new Air Traffic Control Tower (ATCT) at LaGuardia Airport in Flushing, New York.¹⁷⁰¹ The

construction is being funded with \$23 million in FY 2001 Facilities and Equipment funds from the Department of Transportation and Related Agencies Appropriation Act for 2001.¹⁷⁰² The new ATCT will replace an existing ATCT owned by the Port Authority of New York and New Jersey. When the new ATCT is completed, the existing ATCT will obstruct the new tower’s view of air traffic. Consequently, the existing tower must be demolished. The FAA agreed to demolish the tower to the point where the existing tower would no longer obstruct the view from the new ATCT. The Port Authority objected to the demolition plan, believing the remaining structure would present an eyesore.¹⁷⁰³ The FAA requested an advance decision on whether it may use appropriated funds for the complete demolition of the existing ATCT.¹⁷⁰⁴

The question raised by the FAA’s request for an advance decision is twofold. First, is the expenditure for the complete demolition of the existing ATCT necessary to accomplish the purpose of the appropriation? Second, may an agency use appropriated funds to pay for permanent alteration to property not owned by the government? The GAO answered both questions in the affirmative.¹⁷⁰⁵ The GAO analyzed this issue in light of the purpose statute¹⁷⁰⁶ and the necessary expense doctrine¹⁷⁰⁷ as they related to the proposed ATCT demolition.¹⁷⁰⁸

The GAO reviewed the language in the DOT appropriations act, noting that the term “replacement” is generally thought to include the authority to remove an existing facility, then construct a replacement facility in its place. The GAO opined that

1694. See Memorandum, Deputy Assistant Secretary of the Army, subject: Information Technology Management Reform Act of 1996—Army Reimbursement Guidance (23 July 2001) (answering “generally no” to the following question: “[M]ay the unexpended balance of appropriated funds obligated to the GSA to meet certain bona fide requirements of the Army for information technology for one fiscal year be redirected after the end of the fiscal year to meet other requirements of the Army that were not previously addressed or were not applicable until a later fiscal year?”) (on file with author).

1695. Honorable Jerry Lewis, Comp. Gen. B-287619, July 5, 2001, available at <http://www.gao.gov/decisions/appro/287619.htm>.

1696. See 31 U.S.C. § 1341(a) (2001).

1697. See, e.g., 10 U.S.C. §§ 1079, 1086 (2001).

1698. Honorable Jerry Lewis, Comp. Gen. B-287619, at 7.

1699. *Id.* The GAO did note, however, that if the DOD were forced to incur obligations in excess of the available appropriation, the DOD would need to obtain additional appropriations to cover the payment for these obligations. *Id.*

1700. One significant issue regarding construction funding is the increased restrictions on the migration of training funds to real property maintenance activities. For a full discussion of this issue, see this article’s section on Operational and Contingency Funding section, *infra* notes 1790-1821 and accompanying text.

1701. Demolition of the Existing LaGuardia Air Traffic Control Tower, B-286457, 2001 U.S. Comp. Gen. LEXIS 37 (Jan. 29, 2001).

1702. Department of Transportation and Related Agencies Appropriation Act for 2001, Pub. L. No. 106-346, 114 Stat. 1356 (2000). The Act appropriated \$145 million for “replacement of air Traffic Control towers and other terminal facilities” at about fifty airports. *Id.* Congress specifically identified \$23 million for the replacement of the control tower at LaGuardia. *LaGuardia Air Traffic Control Tower*, 2001 U.S. Comp. Gen. LEXIS 37, at *1-3.

1703. *LaGuardia Air Traffic Control Tower*, 2001 U.S. Comp. Gen. LEXIS 37, at *2.

1704. *Id.* The Port Authority had refused to fund the remaining demolition cost itself. *Id.* In addition to the aesthetic issues, the FAA expressed concern that the hub for electrical wiring for the existing ATCT is under the base of the tower and may not be accessible without completing the demolition. *Id.* at *2-3.

1705. *Id.* at *3.

1706. 31 U.S.C. § 1301(a) (2000).

while the complete demolition of the existing facility may not be necessary in the strict sense of the word, that is not the test to be applied under the necessary expense doctrine. Rather, the test is whether completely demolishing the existing tower contributes to accomplishing the appropriation's purpose. The GAO found that it did.¹⁷⁰⁹

The second question was more problematic. In general, agencies are not permitted to improve property not owned by the government. Permitting such improvements confers a gratuity upon the owner which government officials are not authorized to make absent statutory authority. The GAO recognized that there may be instances when the government receives a benefit as a result of making permanent improvements to property it does not own.¹⁷¹⁰ The GAO enunciated four factors that should be present before the government expends appropriated funds for permanent alterations to property not owned by the government:

- (1) the improvements are incidental to and essential for the accomplishment of the purposes of the appropriation,
- (2) the cost of the improvement is in reasonable proportion to the overall cost of the contract price,
- (3) the improvements are used for the principal benefit of the government, and

- (4) the interests of the government in the improvements are protected.¹⁷¹¹

After reviewing the policy, the GAO stated that it did not have to apply the policy in this case. Because Congress had specifically identified replacement of ATCTs at specified airports,¹⁷¹² including LaGuardia, the FAA's use of the Facilities and Equipment Appropriation is proper in this instance.¹⁷¹³ Because Congress specifically appropriated funds to replace the tower at LaGuardia, and because the GAO believed that the FAA may reasonably conclude that demolishing the existing tower is necessary to construct the replacement tower, the GAO would not object to the expenditure.¹⁷¹⁴

*Maintenance and Renovation of DOD Historic Properties Continues to Present Challenges*¹⁷¹⁵

The DOD has a large and ever growing supply of historic properties.¹⁷¹⁶ The DOD currently has over 17,300 historic properties.¹⁷¹⁷ As DOD facilities age, more facilities will be defined as historic.¹⁷¹⁸ A number of studies have reviewed the cost associated with maintaining these historic properties.¹⁷¹⁹ The GAO determined that existing data on historic properties are not reliable¹⁷²⁰ and that historic properties appear to cost about the same per square foot for maintenance compared with newer properties.¹⁷²¹ While there was much activity investigating the state of historic properties within the DOD during FY

1707. The "necessary expense doctrine" allows an agency to expend funds if the expenditure is reasonably necessary to carry out an authorized function or contributes materially to the accomplishment of the purposes of the appropriation to be charged, as long as such expense is not otherwise prohibited by law. *Id.*

1708. *LaGuardia Air Traffic Control Tower*, 2001 U.S. Comp. Gen. LEXIS 37, at * 3-4.

1709. *Id.* at *5.

1710. *Id.* at *6.

1711. *Id.* at *7 (citations omitted).

1712. *Id.* at *8 (citing H.R. CONF. REP. NO. 106-940, at 6 (2000)).

1713. *Id.*

1714. *Id.* at *9.

1715. National Defense Authorization Act for Fiscal Year 2000, Pub. L. No. 106-65, § 393, 113 Stat. 512 (1999) (requiring the Comptroller General to review historic properties within the DOD, identify all properties that must be maintained as historic, the cost for FY 2000 and the projected cost for the next ten fiscal years, and the accounts used by the DOD and the services to pay for the maintenance of historic properties).

1716. GENERAL ACCOUNTING OFFICE, MILITARY SERVICES LACK RELIABLE DATA ON HISTORIC PROPERTIES, REPORT NO. GAO-01-437, at 1 (Apr. 2001).

1717. *Id.* This figure only includes those properties currently listed as historic properties. It does not include those properties eligible for listing. *Id.* at 3.

1718. Historic properties are those properties that meet criteria established by the National Historic Preservation Act of 1966, Pub. L. No. 89-665, as amended, codified at 16 U.S.C. § 470 (2000).

1719. U.S. DEP'T OF DEFENSE, THE COST OF MAINTAINING HISTORIC MILITARY FAMILY HOUSING (Feb. 2001), available at https://www.denix.osd.mil/denix/Public/ES-Programs/Conservation/Legacy/Housing_Costs/DODhousingfinal.pdf. See also DEP'T OF NAVY, MODERNIZATION OF HISTORIC MILITARY HOUSING, FINAL REPORT: HISTORIC MILITARY HOUSING: THREAT OR OPPORTUNITY? (undated), available at <https://www.denix.osd.mil/denix/Public/ES-Programs/Conservation/Housing/modern-hous.html>.

1720. GENERAL ACCOUNTING OFFICE, MILITARY SERVICES LACK RELIABLE DATA ON HISTORIC PROPERTIES, REPORT NO. GAO-01-437, at 3-6 (Apr. 2001).

2001, very little in the way of concrete policy decision resulted. Expect the funding of historic property maintenance to continue to be an issue of concern and investigation during FY 2002.¹⁷²²

*Build It and They Will Come:
CJCS Issues a New Instruction on Exercise-Related
Construction*

Exercise Related Construction, or ERC, is a hot-button issue for congressional oversight.¹⁷²³ Congress has taken a dim view of any instance where DOD organizations have failed to play by the established rules,¹⁷²⁴ and the services continue to experience difficulties executing ERC projects within the established constraints.¹⁷²⁵ In an effort to assist commands in preparing for and executing ERC, the Chairman of the Joint Chiefs of Staff (CJCS) has issued a new instruction.¹⁷²⁶ The instruction establishes the responsibilities under the ERC program,¹⁷²⁷ procedures for the management of ERC programs,¹⁷²⁸ and congressional interaction and notification.¹⁷²⁹ The new instruction should not have a significant impact on existing Army ERC guidance.¹⁷³⁰

DOD Establishes Unified Facility Criteria

On 6 October 2000, the DOD announced the establishment of a program to unify all design and construction technical criteria.¹⁷³¹ The program will simplify the way architectural and engineering firms do business with the DOD and will make use of commercial construction standards to the maximum extent possible. The new standards should provide for more cost effective and faster generation of facility designs. The unified design criteria should help delineate what components are required to make a facility “complete and useable” for its intended purpose. The unified criteria will be published only in electronic format and will be instantaneously updated as standards are refined and updated.¹⁷³²

Intragovernmental Acquisitions

Do the Fees Match the Effort?

In April 2001, the Senate Governmental Affairs Committee directed the GAO to study the government’s use of multi-agency contracts.¹⁷³³ The request asks that the focus of the study be on fees charged by agencies, because “there may be

1721. *Id.* at 9-12. The GAO determined that while the cost per square foot was about the same, the larger size of historic properties resulted in increased costs for maintenance and repair compared with newer properties utilized for the same functional purpose. *Id.* at 9.

1722. *Id.* at 12. The GAO recommended that Secretary of Defense require the services to update their inventories of historic property, including those properties listed or eligible for listing on the National Register of Historic Places. *Id.*

1723. 10 U.S.C. § 2805(a)(2) (2000). Section 2805(a)(2) prohibits a secretary of a military department from using more than \$5 million for exercise-related unspecified minor military construction during an exercise outside the United States directed or coordinated by the Joint Chiefs of Staff in any fiscal year. *Id.*

1724. See generally Honorable Bill Alexander, 63 Comp. Gen. 422 (1984); and Honorable Bill Alexander, Comp. Gen. B-213137, Jan. 30, 1986 (unpublished) (concluding that the Purpose Statute applies to OCONUS military exercises) (discussing the DOD’s failure to apply existing construction funding restrictions to construction projects undertaken during a series of joint and combined exercise in Honduras in the 1980s).

1725. See, e.g., AIR FORCE AUDIT AGENCY, EGLIN AREA AUDIT OFFICE, INSTALLATION REPORT OF AUDIT #DE001007, FUNDS AND PURCHASING MANAGEMENT DURING DEPLOYMENT 823 RED HORSE SQUADRON, HURLBURT FIELD, FLORIDA (Oct. 24, 2000). The audit report details the adventures of the Squadron commander while executing an ERC project in Jordan in 1997. *Id.* According to the audit report, the squadron commander is awaiting disciplinary action for his misdeeds in executing the ERC project. *Id.* at 12.

1726. JOINT CHIEFS OF STAFF, INSTR. 4600.01, EXERCISE-RELATED CONSTRUCTION STANDARD OPERATING PROCEDURES (20 June 2001).

1727. *Id.* encl. A.

1728. *Id.* encl. B. Procedural guidance is provided for the determination of ERC cost, project ranking, training value, coordination, congressional notification, execution messages, and funding policies, among others. *Id.*

1729. *Id.* encls. C, E. The instruction also provides guidance on the use of the ERC database. *Id.* encl. F.

1730. See U.S. DEP’T OF ARMY, REG. 415-32, ENGINEER TROOP UNIT CONSTRUCTION IN CONNECTION WITH TRAINING ACTIVITIES (15 Apr. 1998). Chapter 3, Troop Construction in Conjunction with Training Exercises Conducted Outside the United States, provides Army-specific guidance for ERC. *Id.* ch. 3.

1731. Press Release, Office of the Assistant Secretary of Defense (Public Affairs), DOD Establishes Unified Facility Criteria (Oct. 6, 2000) (on file with author).

1732. *Id.* Additional information is available at the following Web sites: Unified Master Reference List (UMRL) (Sept. 2001), at <http://www.hnd.usace.army.mil/techinfo/nibs/umrlall.pdf>; U.S. Army Corps of Engineers at <http://www.hnd.usace.army.mil/techinfo/ufc.htm>; Naval Facilities Engineering Command at <http://criteria.navfac.navy.mil/criteria>; Air Force Civil Engineering Support Agency at <http://www.afcesa.af.mil>; National Institute of Building Sciences(NIBS)/Construction Criteria Base at <http://www.ccb.org>; and NIBS/Whole Building Design Guide at <http://www.wbdg.org>.

1733. See 43 THE GOV’T CONTRACTOR 18, ¶ 178 (May 2, 2001).

substantial variation in the fees being charged for similar services.”¹⁷³⁴ The concern is that user fees charged to other agencies “may substantially exceed the actual costs and circumvent congressional control and oversight.”¹⁷³⁵

The Committee wants to determine if “user fees associated with multi-agency contracts are equitable and tailored to recapture the actual costs of managing and administering these types of contracts.”¹⁷³⁶ To date, the GAO has not released a report on the matter. If their conclusion is that agencies have been overcharging user fees, however, the next question is: What have they been doing with the “profit?” Both this report and subsequent congressional reaction to its conclusions merit close scrutiny because they may have a major impact on the current practice of agencies providing services to other agencies.

GAO Agrees that GSA Exceeded the Scope of IT Contract

The Federal Property and Administrative Services Act¹⁷³⁷ authorizes the GSA to “procure and supply personal property and nonpersonal services for the use of executive agencies in the proper discharge of their responsibilities.”¹⁷³⁸ Under the Clinger-Cohen Act of 1996,¹⁷³⁹ agencies can acquire information technology (IT) through the GSA. Both authorities specifically remove such interagency acquisitions (IGA) from the Economy Act,¹⁷⁴⁰ which applies only “when more specific statutory authority does not exist.”¹⁷⁴¹ These authorities, however, do not allow agencies acquiring IT through the GSA to issue task orders that increase the scope, period, or maximum value of the underlying contracts.

In *Floro & Associates*,¹⁷⁴² the GSA issued a task order against a multiple award, indefinite delivery/indefinite quantity

(MAIDIQ) contract. The GAO concluded that the task order, which was for management services to assist an agency with their “Collaboration and Distance Learning Mentorship product lines,”¹⁷⁴³ was materially different from the MAIDIQ contract, which required “commercially off-the-shelf hardware and software resulting in turnkey systems for GSA’s client agencies.”¹⁷⁴⁴ The GAO acknowledged that the projects under the task order could require the use and application of IT acquired under the MAIDIQ contract. The GAO, however, could find “no tasks or subtasks included in the [scheduled of work] for this [task] order that are susceptible of being classified as non-complex integration services [under the MAIDIQ contract].”¹⁷⁴⁵ The practice point is that task orders should be reasonably anticipated by potential offerors of the underlying contract—even when the order is placed through an IGA.

Nonappropriated Funds

DOD Allows One-Time Exception for TDY to Army Ten-Miler

On 27 September 2001, the Assistant Secretary of Defense (Force Management Policy) issued a memorandum permitting a one-time exception to the general rule¹⁷⁴⁶ that commands may not use appropriated funds (AFs) to send soldiers to Washington, DC for the “Army Ten-Miler.”¹⁷⁴⁷ Before the race was canceled this year, commands were permitted to spend AFs for travel and per diem of “team participants” traveling to the Ten-Miler.¹⁷⁴⁸ Commanders who are general officers were allowed to authorize such use of AFs for “not more than one team from each sponsoring command in each event category.”¹⁷⁴⁹ Moreover, “[t]eam membership is limited to soldiers and cadets and should be based on participation in an installation, activity, or command intramural program.”¹⁷⁵⁰ Finally, the memo also per-

1734. *Id.* (citing a letter from Senators Fred Thompson (R-TN) and Joseph Lieberman (D-CT) to the Comptroller General).

1735. *Id.*

1736. *Id.*

1737. Codified in scattered sections of 40, 41 U.S.C. (2000).

1738. *See* 40 U.S.C. § 481(a)(3).

1739. 40 U.S.C. § 1401; 41 U.S.C. § 251.

1740. 31 U.S.C. § 1535 (2000).

1741. *See FAR*, *supra* note 11, § 17.500(b).

1742. Comp. Gen. B-285.451.3, B-285481.4, Oct. 25, 2000, 2000 CPD ¶ 172.

1743. *Id.* at 7.

1744. *Id.*

1745. *Id.*

1746. *See* Memorandum, Dep’t of the Army, Deputy General Counsel (Ethics and Fiscal), to Command Judge Advocate, U.S. Army Community & Family Support Center, subject: Use of Appropriated Funds for Travel to Army 10-Miler (20 Mar. 2000).

mitted commands to obtain travel funding through commercial sponsorship.¹⁷⁵¹

Alas Poor UREP, We Hardly Knew Thee

Last year, we wrote about the Uniform Resource Expanded Program (UREP).¹⁷⁵² The UREP was a proposed extension of the Uniform Resources Demonstration (URD).¹⁷⁵³ The URD permitted the merging of NAFs and AFs to support Morale, Welfare and Recreation (MWR) programs authorized AF support.¹⁷⁵⁴ Unfortunately for fans of the UREP, it appears that the program will not be enacted during the current session of Congress.¹⁷⁵⁵

Army Issues New Civilian MWR Regulation

On 26 January 2001, the Army issued a new civilian MWR regulation.¹⁷⁵⁶ This new regulation “[r]eplaces the joint Army Regulation 215-7/AFR 176-14 due to the dissolution of the

Army and Air Force Civilian Welfare Fund.”¹⁷⁵⁷ The new regulation makes only minor changes to its predecessor regulations.¹⁷⁵⁸

CAFC Affirms Furash Decision

Last year’s Year in Review discussed *Furash & Co. v. United States*,¹⁷⁵⁹ in which the COFC ruled that it does not have jurisdiction over a self-funding government agency.¹⁷⁶⁰ On 13 July 2001, the CAFC affirmed the COFC’s decision.¹⁷⁶¹ Agreeing with the COFC that jurisdiction lies only over agencies that operate with appropriated funds, the court held that, because “the Finance Board’s operations are to be funded through assessments against federal home loan banks, not from general fund revenues, . . . the Court of Federal Claims therefore lacks . . . jurisdiction over this case.”¹⁷⁶² This case is useful for government practitioners defending NAF entities because it provides a ready defense against any suit brought in the COFC.¹⁷⁶³

1747. Memorandum, Assistant Secretary of Defense (Force Management Policy), to Assistant Secretary of the Army (Manpower and Reserve Affairs), subject: Funding of the Military Team Members Participating in the October 2001 Army 10-Miler Morale and Fitness Event (27 Sept. 2001). Secretary of the Army Thomas White issued a similar memo on 1 October 2001. See Memorandum, Secretary of the Army, to Assistant Secretary of the Army (Manpower & Reserve Affairs) et al., subject: Endorsement of the October 2001 Army Ten-Miler as an Army-Wide Morale and Fitness Event (1 Oct. 2001) [collectively, hereinafter 10-Miler Memos]. For information on the Army Ten-Miler, see their Web site. Military District of Washington, *Army Ten-Miler*, at <http://www.armytenmiler.com/home.html> (last visited Oct. 12, 2001).

1748. 10-Miler Memos, *supra* note 1747.

1749. *Id.*

1750. *Id.*

1751. *Id.* See generally U.S. DEP’T OF ARMY, REG. 215-1, MORALE, WELFARE, AND RECREATION ACTIVITIES AND NONAPPROPRIATED FUND INSTRUMENTALITIES para. 7-47 (25 Oct. 1998).

1752. 2000 Year in Review, *supra* note 2, at 100.

1753. *Id.*

1754. *Id.*

1755. See U.S. Army Community and Family Support Center, *DOD Legislation (107th Congress)* (5 July 2001) (on file with author). We do not know exactly why Congress does not favor this legislation.

1756. U.S. DEP’T OF ARMY, REG. 215-7, CIVILIAN NONAPPROPRIATED FUNDS AND MORALE, WELFARE, AND RECREATION ACTIVITIES (26 Jan. 2001).

1757. *Id.* at Summary of Change.

1758. *Id.*

1759. 46 Fed. Cl. 518 (2000).

1760. 2000 Year in Review, *supra* note 2, at 100. *Furash* involved the U.S. Finance Board, an independent government agency supported by assessments on member banks rather than by appropriated funds. See 46 Fed. Cl. at 522-23.

1761. *Furash & Co. v. United States*, 252 F.3d 1336 (Fed. Cir. 2001).

1762. *Id.* at 1339-40.

1763. Attorneys should realize, however, that 28 U.S.C. § 1491(a)(1) (2000) establishes a separate basis for COFC jurisdiction over claims against service exchanges.

In another jurisdiction case, the ASBCA decided that it had jurisdiction over a dispute between a commissary bagger and the Defense Commissary Agency (DECA). In *Enrique (Hank) Hernandez*,¹⁷⁶⁴ the claimant worked as a commissary bagger at Goodfellow Air Force Base in Texas. Mr. Hernandez had signed an agreement with Goodfellow's commissary officer acknowledging his status as an independent contractor, acknowledging he was not a DECA employee, and agreeing that he would work for customer tips only.¹⁷⁶⁵ After the commissary officer fired Mr. Hernandez for alleged discourteous customer service, Mr. Hernandez complained to the DECA's regional director that his firing violated the signed agreement. The regional director never responded to Mr. Hernandez's claim.¹⁷⁶⁶ Mr. Hernandez next complained to the DECA, whose deputy general counsel denied relief, telling Mr. Hernandez that he did not have a contract with the DECA. Mr. Hernandez then filed an appeal with the ASBCA.¹⁷⁶⁷

Moving to dismiss, the government argued that the ASBCA lacked jurisdiction over Mr. Hernandez's claim because there was never a contract between the claimant and the government within the meaning of the CDA.¹⁷⁶⁸ Mr. Hernandez countered that he had an implied-in-fact contract with the government, which granted the board jurisdiction.¹⁷⁶⁹

The board sided with Mr. Hernandez, finding that the

[a]ppellant offered to be a bagger at the commissary, and the services of appellant were accepted by the Government in signing the Agreement. The mutuality of consideration was the Government's obligation in consenting to appellant's performance of bagging services to furnish space for appellant's operations and encourage patrons to tip or, at a

minimum, notify patrons that baggers work only for tips. Appellant was obligated to perform the bagging services according to the terms of the Agreement and received the benefit of tips. The Government received the benefit of customer service.¹⁷⁷⁰ The parties' mutual intent that appellant provide bagging services as an independent contractor and not an employee of the Government is evident in the terms of the Agreement. The parties' Agreement meets all of the requirements for the formation of a contract.¹⁷⁷¹

This case may potentially open up claims by independent contractors and concessionaires to CDA litigation. Though many such contractors and concessionaires will not seek CDA litigation, NAF contract advisors and attorneys should keep this case in mind when drafting agreements and especially in settling disputes.

Obligations

Deputy Secretary of Defense Invokes Feed and Forage Act

On 16 September 2001, pursuant to 41 U.S.C. § 11,¹⁷⁷² the Deputy Secretary of Defense authorized the military departments to incur obligations in excess of available appropriations to support units conducting military operations in response to the 11 September 2001 terrorist attacks and aircraft crashes.¹⁷⁷³ The Deputy Secretary of Defense also authorized the military departments to incur deficiencies for the costs associated with the increased number of armed forces personnel called to active duty.¹⁷⁷⁴

1764. ASBCA No. 53011, 00-2 BCA ¶ 31,220.

1765. *Id.* at 154,100.

1766. *Id.* at 154,101.

1767. *Id.* at 154,102.

1768. *Id.* The Contract Disputes Act, 41 U.S.C. §§ 607(d) 602 (2000), grants jurisdiction to the Board over disputes arising out of contracts with the government.

1769. *Enrique (Hank) Hernandez*, 00-2 BCA ¶ 31,220 at 154,103.

1770. Though there was not much "customer service," according to the commissary officer. *Id.* at 154,101.

1771. *Id.* at 154,103.

1772. 41 U.S.C. § 11 (2000).

1773. Memorandum, Deputy Secretary of Defense, subject: Obligations in Excess of Appropriations Subsequent to Terrorist Attacks and Aircraft Crashes at the World Trade Center, the Pentagon and in Pennsylvania (16 Sept. 2001).

1774. *Id.* (citing 10 U.S.C. § 2201(c) (2000)).

*Continued Availability of Expired Appropriation for
Additional Project Phases*¹⁷⁷⁵

In May 1997, PERSCOM entered into a “Basic Agreement” with the GSA’s Federal FEDSIM for developing and implementing a declassification management system.¹⁷⁷⁶ The agreement was authorized pursuant to the Brooks Act,¹⁷⁷⁷ which allowed the GSA to enter into multiyear contracts.¹⁷⁷⁸ Under the terms of the Basic Agreement,

[T]he existence of a defined requirement at the time this Basic Agreement is executed forms the basis for the incurring and recording of a financial obligation on the part of the client. This obligation remains in force across fiscal year boundaries until the specified services are delivered or the Agreement is rescinded by the signatories.¹⁷⁷⁹

The Basic Agreement addressed only phase one of a proposed three-phase project.¹⁷⁸⁰ PERSCOM obligated \$17.5 million of FY 1997 funds towards phase one work.¹⁷⁸¹ The agreement did not require FEDSIM to do any work on phases two or three. The first phase was completed in May 1998 and cost only \$8.5 million. After FY 1997 ended, PERSCOM wanted to “use the unexpended, but expired, balance of \$9 million to complete work.”¹⁷⁸²

The Comptroller General opinion first sets forth the “black-letter” law concerning availability of obligations: “Obligated

budget authority is available only to liquidate liabilities (i.e., obligations) legally incurred during the period for which the appropriation is available. Generally, if an agency has obligated more funds than needed for a project, it should deobligate the excess amount.”¹⁷⁸³ Further, once an agency liquidates an obligation, “any remaining balances are not available to enter into a new obligation after the account has expired (i.e. if fiscal year funds, after the end of the fiscal year).”¹⁷⁸⁴ Because PERSCOM’s agreement covered only phase one, the obligated FY 1997 funds were available only to liquidate obligations incurred for phase one.¹⁷⁸⁵

PERSCOM argued that phases two and three were bona fide needs of FY 1997, and that “the expired budget authority should remain available to fund these additional phases.”¹⁷⁸⁶ As GAO pointed out, however, “[n]othing in the bona fide needs rule suggests that expired appropriations may be used for a project for which a valid obligation was not incurred prior to expiration merely because there was a need for that project during that period.”¹⁷⁸⁷ Therefore, “[b]ecause PERSCOM entered into an agreement incurring an obligation for only one phase of the project, it cannot now obligate and charge payments for additional phases to the expired fiscal year 1997 appropriation.”¹⁷⁸⁸ Even if PERSCOM could show that the later phases were bona fide needs of FY 1997, “PERSCOM did not take appropriate action to satisfy that need during the fiscal year by contracting (i.e. incurring valid obligations) for additional phases during the period of availability of the appropriation.”¹⁷⁸⁹ Therefore, PERSCOM could not obligate FY 1997

1775. Comp. Gen. B-286929, April 25, 2001, *available at* http://www.access.gpo.gov/su_docs/aces/aces170.shtml. For additional discussion of this decision, see *supra* notes 1689-94 and accompanying text, and *infra* notes 1829-31 and accompanying text.

1776. *Continued Availability*, Comp. Gen. B-286929, at 2.

1777. 40 U.S.C. § 757 (2000).

1778. *Continued Availability*, Comp. Gen. B-286929, at 2 (citing 40 U.S.C. § 757).

1779. *Id.*

1780. *Id.* “Phase I . . . consisted of designing and testing. Phase II will consist of establishing the declassification program. . . . Phase III will consist of developing a long-term program to sustain the declassification effort.” *Id.*

1781. *Id.* at 3 (citations omitted).

1782. *Id.*

1783. *Id.* (citing 31 U.S.C. § 1553(a) (2000)).

1784. *Id.* at 4 (citation omitted).

1785. *Id.*

1786. *Id.*

1787. *Id.* (citation omitted).

1788. *Id.* at 1.

1789. *Id.* at 4.

funds after those funds had expired even if the need arose during FY 1997.

Operational and Contingency Funding

New FMR Chapter Provides Guidance on “CONOPS” Funding

In February 2001, the DOD issued a revised *Financial Management Regulation* chapter on contingency operations.¹⁷⁹⁰ Generally speaking, the services must execute contingency operations with current funding, and then provide the DOD with financial data to support the transfer of designated contingency funds to the departments,¹⁷⁹¹ justification for supplemental appropriations,¹⁷⁹² and justification for the billing of non-DOD organizations for reimbursable support.¹⁷⁹³ The revised chapter updates the guidance for funding DOD contingency operations,¹⁷⁹⁴ including peace and humanitarian operations, noncombatant evacuation operations (NEOs), and foreign

disaster relief operations.¹⁷⁹⁵ Funding guidance for peacetime civil emergencies in CONUS is specifically excluded from the revised chapter.¹⁷⁹⁶

The chapter provides guidance on the estimating process,¹⁷⁹⁷ the costs that may be reimbursed in a contingency operation,¹⁷⁹⁸ cost collection, determination, and reporting.¹⁷⁹⁹ The chapter also addresses special funding mechanisms,¹⁸⁰⁰ support to the United Nations,¹⁸⁰¹ and funding issues in NEOs.¹⁸⁰²

Sand Dollars: Southwest Asia Is No Longer a “Contingency” for Funding Purposes

Contingency operations funding has been, and will continue to be, an important topic of discussions between the DOD and Congress. Since the end of the Gulf War, the DOD has reported over \$25 billion¹⁸⁰³ in incremental costs¹⁸⁰⁴ for overseas contingency operations. Since the Iraqi invasion of Kuwait in August 1990, the United States has maintained an ongoing robust pres-

1790. U.S. DEP'T OF DEFENSE, REG. 7000.14-R, FINANCIAL MANAGEMENT REGULATION, vol. 12 (Special Accounts and Programs), ch. 23 (Contingency Operations) (Feb. 2001) [hereinafter DOD FMR Contingency Operations].

1791. See Overseas Contingency Operations Transfer Fund (OCOTF), DOD Appropriations Act for FY 2001, Pub. L. No. 106-259, § 8131, 114 Stat. 661 (2000). The Act appropriates \$3.94 billion of “no-year” funds “for expenditures directly relating to Overseas Contingency Operations by U.S. Military Forces.” *Id.* These funds may be transferred to Operations and Maintenance (O&M) accounts, military personnel accounts, Defense Health Program appropriation, procurement accounts, Research, Development, Test, and Evaluation (RDT&E) accounts, and working capital funds. See also U.S. DEP'T OF DEFENSE, REG. 7000.14-R, DOD FINANCIAL MANAGEMENT REGULATION, vol. 2B (Budget Formulation and Presentation), ch. 17, (Contingency Operations) (June 2000) [hereinafter DOD FMR Contingency Operations Budget Formulation].

1792. Supplemental appropriations have become routine over the last decade. For an example of a typical supplemental appropriation, see Emergency Supplemental Appropriations Act for Fiscal Year 1999, Pub. L. No. 106-31 (1999).

1793. The DOD may provide reimbursable support to other U.S. government agencies, and selected international organizations and foreign countries. Authorities to provide such support include: Economy Act, 31 U.S.C. § 1535 (2000); Foreign Assistance Act § 607, codified at 22 U.S.C. § 2357 (2000); UN Participation Act, codified at 22 U.S.C. § 287d-1; and Foreign Assistance Act § 632, codified at 22 U.S.C. § 2392.

1794. 10 U.S.C. § 101(13) (2000).

1795. DOD FMR Contingency Operations, *supra* note 1790, para. 230101.

1796. *Id.*

1797. *Id.* para. 2304.

1798. *Id.* para. 2306. Costs associated with a contingency operation are limited to the incremental costs of the operation, that is, costs that are above baseline training, operations, and personnel costs. *Id.* In other words, the costs that the unit would not otherwise have incurred, but for the contingency.

1799. *Id.* paras. 2307, 2309, and 2308 (respectively).

1800. *Id.* para. 2306. Chapter 23 uses the term “special funding mechanisms” in reference to the authority granted under 10 U.S.C. § 127a. Under section 127a, the Secretary of Defense has the authority to, under certain conditions, waive reimbursement of Working Capital Funds, and to transfer up to \$200 million in any fiscal year to reimburse accounts used to fund operations for incremental expenses incurred. 10 U.S.C. § 127a (2000).

1801. DOD FMR Contingency Operations, *supra* note 1790, para. 231003.

1802. *Id.* para. 231102.

1803. GENERAL ACCOUNTING OFFICE, NEED FOR CONTINUED VISIBILITY OVER USE OF CONTINGENCY FUNDS, REPORT NO. GAO-01-829, at 1 (July 6, 2001) [hereinafter CONTINUED VISIBILITY]. Over \$22 billion of those costs have been incurred in Southwest Asia (SWA) and the Balkans. *Id.* Through September 2000, \$15.1 billion had been expended in the Balkans. *Id.* at 3. A further \$7.1 billion had been expended in SWA. *Id.* at 4.

1804. Incremental costs are those costs directly attributable to the operation that would not have been incurred but for the operation. *Id.* at 1 n.1.

ence in the Southwest Asia (SWA) theater.¹⁸⁰⁵ The cost of maintaining this presence has been more than \$7.1 billion.¹⁸⁰⁶ For a number of years, Congress has pushed the DOD to “budget” more funds for contingency operations, rather than continue to rely on supplemental appropriations requests. Congress authorized the Overseas Contingency Operations Fund (OCOTF),¹⁸⁰⁷ providing a mechanism that allows limited budgeting for contingencies. After ten years, the operations tempo in SWA is now thought to be relatively predictable and the ability of the DOD and the services to budget¹⁸⁰⁸ at the level to sustain current operations is well defined.

Budgeting for operations in SWA as part of the routine budgeting process has advantages, as well as several disadvantages. For example, under the current system, the audit trail for expenditures related to these contingencies is robust and easily discernible.¹⁸⁰⁹ Congress is hoping to achieve better cost control by shifting the cost of the SWA operations to the services.¹⁸¹⁰

Due to the tragic events of 11 September 2001, SWA will likely be eligible for contingency funding again soon to cover the costs of new operations. It remains to be seen how the operations against terrorism will be funded and what mechanisms will be used to control that funding.

*Migration of Training Dollars—Congress to the Army:
Stop Robbing Peter to Pay Paul*

As every teenager knows, it’s hard to live within the budget that mom and dad give you. In the real world, it’s even harder to live within that budget. The Army is no different; trying to live within the budget that Congress approves each year is a daunting task. There will never be enough resources available to execute all the missions the Army believes it must execute to maintain readiness.

In each year’s budget submission documents, the Army indicates to Congress how it will execute the funds provided in each appropriation. Among the many items included under the Army’s Operation and Maintenance (O&M) appropriation is a sub-account for training armored units. Over the last few years, the Army has used over \$1 billion of the \$4.8 billion identified for heavy division training for other, non-training purposes.¹⁸¹¹ The Army primarily used the transferred funds to support base operations and real property maintenance at Army installations.¹⁸¹² Congress has been aware of the issue for the past several years,¹⁸¹³ and has become increasingly unhappy with the Army’s failure to use training funds for their designated purpose.¹⁸¹⁴ The division training sub-activity has been the source for the majority of these transfers.¹⁸¹⁵

1805. The Army has maintained units in Kuwait, and has conducted a number of joint/combined exercises in Kuwait and neighboring countries. Operations Northern & Southern Watch, the enforcement of no-fly zones over much of Iraq, continues on a daily basis. *See generally* CONTINUED VISIBILITY, *supra* note 1803; GENERAL ACCOUNTING OFFICE, FISCAL YEAR 2000 CONTINGENCY OPERATIONS COSTS AND FUNDING, REPORT NO. GAO/NSIAD-00-168 (June 6, 2000); 2000 Year in Review, *supra* note 2, at 101.

1806. As of September 2000, the DOD had expended \$7.1 billion in SWA since the end of the Gulf War. CONTINUED VISIBILITY, *supra* note 1803, at 4.

1807. 2000 Year in Review, *supra* note 2, at 101. Funds from the OCOTF are commonly referred to as “CONOPS” funds. *See* DOD FMR Contingency Operations Budget Formulation, *supra* note 1791.

1808. The Army’s budget submission document for FY 2002 states that the Army received \$210.3 million from the OCOTF in FY 01 for operations in SWA. This level of funding supports 2850 active duty soldiers and 496 reserve component soldiers. U.S. DEP’T OF ARMY, FY 2002 BUDGET SUBMISSION, OPERATIONS AND MAINTENANCE ARMY (OMA) Volume 1: Justification of OMA Estimates for FY 2002 at 135-5 (June 27, 2001), available at <http://www.asafm.army.mil/budget/fybm/fybm.asp>. *See also* CONTINUED VISIBILITY, *supra* note 1803, at 2.

1809. Under current rules, the DOD is required to submit monthly contingency operations cost reports. CONTINUED VISIBILITY, *supra* note 1803, at 2-3, 11. By requiring the services to fund SWA operations directly from service O&M accounts, visibility over these costs will be significantly reduced, if not lost all together. *Id.*

1810. *Id.* at 10.

1811. GENERAL ACCOUNTING OFFICE, NEED TO BETTER INFORM CONGRESS ON FUNDING FOR ARMY DIVISION TRAINING, REPORT NO. GAO-01-902, at 2 (July 5, 2001) [hereinafter ARMY DIVISION TRAINING]. The Army uses a planning figure of 800 tank miles for home station training as a baseline for funding tank training. *Id.* at 10. The Army uses the 800 tank mile goal to develop divisions’ home station training budgets. *Id.* at 6. The Army consistently missed that 800 tank mile average by twenty-six percent during FY 1997 to FY 2000. *Id.* at 10. The Army continues to use the 800 tank mile figure for budgeting purposes. ASSISTANT SECRETARY OF THE ARMY FOR FINANCIAL MANAGEMENT AND COMPTROLLER, FY 2002 ARMY GREEN TOP 2 (June 25, 2001), available at <http://www.asafm.army.mil/budget/fybm/fybm.asp>.

1812. ARMY DIVISION TRAINING, *supra* note 1811, at 2.

1813. *See* GENERAL ACCOUNTING OFFICE, ANALYSIS OF REAL PROPERTY MAINTENANCE AND BASE OPERATIONS FUND MOVEMENTS, REPORT NO. GAO/NSIAD-00-87 (Feb. 29, 2000); GENERAL ACCOUNTING OFFICE, ARMY TRAINING: ONE-THIRD OF 1993 AND 1994 BUDGETED FUNDS WERE USED FOR OTHER PURPOSES, REPORT NO. GAO/NSIAD-95-71 (Apr. 7, 1995).

1814. *See, e.g.*, National Defense Authorization Act for Fiscal Year 2000, Pub. L. No. 106-65, § 365, 113 Stat. 512 (1999) (requiring the Comptroller General to review real property maintenance (RPM) funding, including diversion of training funds to RPM, and the impact of those diversions on readiness).

1815. ARMY DIVISION TRAINING, *supra* note 1811, at 8.

In response to Congress' displeasure, the Army issued guidance for FY 2001, restricting the authority and ability of Army commands to transfer training funds to other purposes.¹⁸¹⁶ As a result of the revised guidance, Army commands are now severely limited in their ability to migrate funds to non-training activities.¹⁸¹⁷ This policy will result in a significant decrease in effective real property maintenance funding over the near term.¹⁸¹⁸

*The Great DOD Giveaway:
DSCA Issues a Drawdown Handbook*

In December, the Defense Security Cooperation Agency (DSCA) issued a *Handbook for Drawdowns of Defense Articles and Services*.¹⁸¹⁹ Drawdown authority¹⁸²⁰ allows the President to provide specified amounts of U.S. government goods and services to authorized recipients. Drawdowns have become ever more important in the execution of U.S. foreign policy over the last decade.¹⁸²¹ DSCA's *Handbook* is a good "nuts and bolts" guide to drawdowns.

Revolving Funds

If You Don't Use It, You Might Just Lose It!

As a general rule, revolving funds are "no-year" funds that do not depend on annual appropriations.¹⁸²² Because of this, agencies with leftover money at the end of a fiscal year may obligate those funds on a project that crosses fiscal years rather

than let them expire. In effect, an agency may be using current year funds several years later if it "banked" those funds with a revolving fund. The GAO, however, issued two opinions and a report to Congress this past year that may limit agencies' ability to bank funds in the future.

In *Implementation of the Library of Congress FEDLINK Revolving Fund*,¹⁸²³ the Library of Congress (Library) asked the GAO whether the Federal Library and Information Network (FEDLINK) revolving fund could keep, without fiscal year limitation, deobligated, unexpended balances of customer funds advanced to it for future customer orders. Like a typical revolving fund, FEDLINK is self-sufficient and uses customer deposits to cover the costs of providing goods and services to its customers. The Library cited its organic legislation to the GAO in arguing that it could bank unspent, deobligated customer funds to cover future customer orders: "Amounts in the accounts of the revolving fund under this section shall be available to the Librarian, in amounts specified in appropriations Acts and *without fiscal year limitation*, to carry out the program covered by each such account."¹⁸²⁴

The GAO agreed with the Library, but only in part. The GAO viewed the FEDLINK revolving fund as having two components: (1) customer advances to cover customer orders, and (2) reimbursements to the Library to cover administrative costs. GAO agreed with the Library that funds used to cover administrative costs retain their no-year identity because they relate to on-going, day-to-day costs. The GAO disagreed with the Library, however, on the issue of funds used for advance orders.

1816. Memorandum, Deputy Chief of Staff for Operations and Plans, Department of the Army, subject: FY01 Operating Tempo (OPTEMPO)/Flying Hour Program (FHP) Management Implementation Instructions (17 Oct. 2000) [hereinafter DCSOPS memo]; Memorandum, Assistant Secretary of the Army (Financial Management and Comptroller), Department of the Army, subject: FY 2001 Operations and Maintenance, Army (OMA) Funding Letter (25 Sept. 2000) [hereinafter ASA(FM&C) Memo].

1817. ASA(FM&C) Memo, *supra* note 1816, at Narrative Guidance, para. 1a (directing major commands to execute ground OPTEMPO and Flying Hour Program as specified in the Combined Arms Training Strategy and prohibiting the migration of training funds to other purposes without prior approval of headquarters, Department of the Army).

1818. *Id.* at 1.

1819. U.S. DEP'T OF DEFENSE, SECURITY COOPERATION AGENCY, DSCA ACTION OFFICER (AO) HANDBOOK FOR FOREIGN ASSISTANCE ACT (FAA): DRAWDOWN OF DEFENSE ARTICLES AND SERVICES (Dec. 15, 2000) [hereinafter DRAWDOWN HANDBOOK], available at: <http://129.48.104.198/programs/erasa/Drawdown%20handbookr1.pdf>.

1820. The Foreign Assistance Act of 1961, Pub. L. 87-195, as amended, provides three drawdown authorities. The relevant sections of the Act are: FAA section 506(a)(1), 22 U.S.C. § 2318 (2000), providing up to \$100 million worth of DOD stocks, services and training per fiscal year for unforeseen emergencies; FAA section 506(a)(2), 22 U.S.C. § 2318, providing up to \$200 million worth of U.S. government stocks, services, and training per fiscal year for counternarcotics, disaster relief, migration and refugee assistance, antiterrorism, and non-proliferation assistance, up to \$75 million of which may come from the DOD; and FAA section 552(c)(2), 22 U.S.C. § 2348a, providing up to \$25 million worth of U.S. government stocks, services and training per fiscal year for peacekeeping. The total drawdown authority per fiscal year is \$325 million, of which \$200 million may be furnished directly by the DOD. For a chart depicting the authorities and authorized uses, see The Judge Advocate General's School Web site at <http://www.jagcnet.army.mil/TJAGSA>. Once you reach the school's home page, toggle on "Publications." Then look under the Contract and Fiscal portion for "Chart: Drawdown Authorities." No password or registration is required.

1821. From 1980 to 1992, the United States executed twenty-five drawdowns for a total value of \$652.02 million. Between 1993 and October 2000, the United States executed forty-nine drawdowns with a total value of \$1,817.8 billion. DRAWDOWN HANDBOOK, *supra* note 1820, para. C2.2.4

1822. 10 U.S.C. § 2210(b) (2000).

1823. Comp. Gen. B-288142, Sept. 6, 2001, available at <http://www.gao.gov/decisions/appro/288142.htm>.

1824. Pub. L. No. 106-481, § 103(e), 114 Stat. 2187 (2000) (emphasis added).

Analyzing the issue in light of the bona fide needs rule,¹⁸²⁵ the GAO reasoned, “When, as here, an agency withdraws funds from its appropriation and makes them available for credit to another appropriation, that amount is available for obligation only for the same period as the appropriation from which the funds were withdrawn.”¹⁸²⁶ Disagreeing with the general rule that revolving funds contain no-year money, the GAO further held, “Because they are subject to the same time limitations as the appropriation from which they were withdrawn, the withdrawn amounts retain their time character and do not assume the time character of the appropriation to which they are credited.”¹⁸²⁷ Making its position even clearer, the GAO went on to state that “amounts withdrawn from a fiscal year appropriation and credited to a no-year revolving fund, such as the FEDLINK revolving fund, are available for obligation only during the fiscal year of availability of the appropriation from which the amount was withdrawn.”¹⁸²⁸

The GAO reached a similar conclusion in *Continued Availability of Expired Appropriation for Additional Project Phases*.¹⁸²⁹ In that case, PERSCOM had contracted with the GSA’s FEDSIM to implement a declassification information management system. The FEDSIM is a revolving fund. Although the contract envisioned a three-phase project, PERSCOM contracted in FY 1997 only for the first phase. It nonetheless obligated enough FY 1997 funds to cover all three phases. After completion of the first phase, PERSCOM wanted to use the remaining funds (\$9 million) to cover the second and third phases of the project. PERSCOM reasoned that, since the remaining funds were in the revolving fund, those funds had not expired and could be used for the remaining phases.¹⁸³⁰

The GAO disagreed, reasoning that even if the second and third phases were bona fide needs of FY 1997, PERSCOM did not incur an obligation to pay for those needs when it originally obligated the FY 1997 funds. In other words, if the original contract had specified that the FY 1997 funds were to cover all three phases, rather than just the first phase, then PERSCOM could have used the remaining \$9 million to pay for the remaining two requirements. Despite the no-year nature of the FEDSIM fund, the GAO found, “Once the obligational period has expired, new obligations must be charged to current funds even if a continuing need arose during the prior period.”¹⁸³¹ The lesson learned for practitioners is to clearly identify all future needs envisioned in the obligation, even if the obligated funds enter a revolving fund.

The GAO also expressed concern with DOD’s practice of “banking” money in revolving funds in a report released to Congress on 30 May 2001.¹⁸³² Citing DOD’s FY 2001 budget estimates, the GAO stated that “working capital fund industrial activities will have about \$7 billion of funded work that will be carried over from fiscal year 2001 into fiscal year 2002.”¹⁸³³ Though recognizing the necessity of “some carryover to ensure a smooth flow of work during the transition from one fiscal year to the next,” the GAO noted that Congress is concerned “that the level of carryover may be more than is needed for this purpose.”¹⁸³⁴ After analyzing how the DOD runs its working capital funds, the GAO concluded by recommending that the DOD implement four initiatives to bring consistency to the DOD’s carryover policies.¹⁸³⁵ The DOD has accepted these recommendations.¹⁸³⁶

1825. 31 U.S.C. § 1502 (2000). The GAO actually cited 31 U.S.C. § 1532 (2000) in its analysis.

1826. *FEDLINK Revolving Fund*, Comp. Gen. B-288142, at 2.

1827. *Id.*

1828. *Id.*

1829. Comp. Gen. B-286929, Apr. 25, 2001, available at http://www.access.gpo.gov/su_docs/aces/aces170.shtml. For further discussion of this decision, see *supra* notes 1689-94 and 1772-89.

1830. *Continued Availability*, Comp. Gen. B-286929, at 5.

1831. *Id.*

1832. GENERAL ACCOUNTING OFFICE, DEFENSE WORKING CAPITAL FUND: IMPROVEMENTS NEEDED FOR MANAGING THE BACKLOG OF FUNDED WORK, REPORT NO. GAO-01-559 (May 30, 2001).

1833. *Id.* at 1.

1834. *Id.*

1835. Those recommendations involve:

- (1) determining the appropriate carryover standard for the depot maintenance, ordnance, and research and development activity groups based on the type of work performed by the activity group and its business practices, (2) clarifying DOD’s policy on calculating months of carryover, (3) ensuring that the services calculate carryover in a consistent manner so that the carryover figures are comparable, and (4) providing better information on budgeted carryover.

Id. at 4.

These GAO opinions and report to Congress send a message to the DOD to carefully manage all monies placed in revolving funds. Although such funds may technically become no-year funds, the GAO and Congress likely will carefully evaluate

whether an agency is using the revolving funds to simply bank funds otherwise set to expire.

1836. *Id.* at 28.